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No. 92-863

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRITO-LAY, INC. and TRACY-LOCKE, INC.,
Petitioners,

v.

TOM WAITS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court below correctly affirm a jury verdict, rendered in a United States District Court, based upon a California state remedy for unauthorized misappropriation of a widely-known singer's distinctive voice for commercial purposes.

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INTRODUCTION

This past year, this Court declined to disturb the holding in *Midler v. Ford Motor Company*, 849 F.2d 831 (9th Cir. 1988), *cert. denied*, 112 S.Ct. 1513 (1992). In *Midler*, the Court of Appeals for the Ninth Circuit held "[W]hen a distinctive voice of a professional singer is widely-known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs

and have committed a tort in California." *Id.* at 463. The *Midler* case firmly established the legal foundation upon which singer Tom Waits brought suit against snack food manufacturer Frito-Lay, Inc. ("Frito-Lay") and its advertising agency Tracy-Locke, Inc. ("Tracy-Locke") when they created and broadcast a radio commercial launching a new brand of corn chips which featured a near-perfect "sound-alike" of Waits, urging listeners to try and to buy the new product.

In denying the Writ of Certiorari in the *Midler* case, *Young & Rubican, Inc. v. Midler,* 112 S.Ct. 1513 (March 23, 1992), this Court considered precisely the same challenges that are the subject of this Petition. Specifically, the ad agency in *Midler* (represented by the same counsel as Petitioners in this case) argued that (1) the California tort of "voice misappropriation" was preempted by the Federal copyright laws, and (2) the *Midler* decision was somehow in conflict with the Seventh Circuit decision in *Baltimore Orioles v. Major League Baseball Players,* 805 F.2d 663 (7th Cir. 1987), *cert. denied,* 480 U.S. 941 (1987). In rejecting those challenges, this Court let *Midler* stand. For the reasons set forth below, the unsuccessful challenges to *Midler* have even less application here. The Ninth Circuit's thoughtful and thorough decision in *Waits v. Frito-Lay, Inc.* should not be disturbed.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains many polemic legal conclusions instead of facts, and omits other facts that are essential to an understanding of this case. Accordingly, Respondent submits the following in an effort to present a more accurate and complete factual statement.

Respondent Tom Waits is a professional singer, songwriter and actor, best known as a performer for his distinctive and readily recognizable gravelly, raspy voice. He has released some 17 albums over his twenty year career. He has performed in "sold out" concerts throughout the United States, Europe, Japan and Australia. He has received awards and honors from various music journals. He has appeared (and sung) in feature motion pictures and has performed on television programs such as "Saturday Night Live", "Late Night With David Letterman", "The Merv Griffin Show" and others. He was nominated for an Academy Award for best score of a motion picture, and he has been the subject of articles in *Time*, *Newsweek*, and *The Wall Street Journal*, and many music trade magazines.

For years, however, Tom Waits has refused to perform for television or radio commercial advertisements and thus to lend his name to various products. He has refused endorsement offers from Honda motorcycles, Kraft mayonnaise, Burger King, Quaker cereals, Keds sneakers; he rebuffed inquiries or offers of $1 million and $300,000 respectively for beer and Japanese whiskey commercials. Moreover, he has spoken out in interviews against celebrity endorsements.

Petitioner Frito-Lay, Inc. is a subsidiary of PepsiCo, Inc., and Petitioner Tracy-Locke, Inc., its advertising agency, is a subsidiary of Omnicom Group, Inc. Corporate stock in both parent corporations is traded on the New York Stock Exchange. In 1988, Frito-Lay decided to release a new flavor of its Dorito brand tortilla chips called Salsa Rio and, in order to establish consumer awareness, determined to mount a radio commercial campaign. Carl LaFlamme of Tracy-Locke, the copywriter assigned to the product, first proposed a brassy, contemporary

"salsa music" approach featuring entertainer Jay Leno, who was already under contract as a spokesman for Frito-Lay. However, when this concept was presented to the Dorito/Frito-Lay group, it was rejected.

It was then Mr. LaFlamme's task to come up with something different and he remembered a jazzy Tom Waits song called "Step Right Up", that was circulating around the agency at the time because it was a humorous indictment of advertising and hucksterism. "Step Right Up" had been recorded by Waits in his characteristic raspy voice. LaFlamme wrote an entirely new commercial, set in a jazz nightclub, and used the rhyming word play (but entirely different words and melody) of "Step Right Up."

When this concept was presented to the Frito-Lay executives, LaFlamme not only played his own commercial but also played "Step Right Up" to demonstrate the feeling which the finished commercial would capture. The client liked what it heard.

The next step was to produce that finished commercial. A production company, Westwood Communications of Vancouver, was engaged and started production under the observation of LaFlamme and Eric Brenner, head of production for Tracy-Locke. Westwood chose a professional singer and voice-over specialist, Jim Byrnes, to sing the lead vocal. Byrnes is an experienced impersonator, but a Tom Waits impersonation is not in his repertoire. Byrnes naturally sings in a deep, blues-sounding voice.

Although LaFlamme and Brenner were pleased with Byrnes' rendition, to their astonishment, Messrs. Grossman, the Tracy-Locke account executive, and Roach, the Agency's creative director, were not. The Frito-Lay executives were also dissatisfied. At this point, LaFlamme,

the writer-composer of the commercial, was pushed aside, and Grossman and Roach took over. As new singers were auditioned in a Dallas studio, "Step Right Up" was played for them. An engineer volunteered that he knew of a singer who performed a Tom Waits imitation. That singer – Stephen Carter – was promptly contacted.

Carter performed in a bar band in the Dallas area and was a Waits fan. He had perfected the art of imitating Waits' voice. When Carter auditioned, Roach admitted he did a "double take" at Carter's ability to imitate Waits' voice so perfectly. When Carter left the audition, he was told by one producer that he would probably not get the job because he sounded too much like Tom Waits. Yet minutes after he returned home, he was offered (and accepted) the job.

The Tracy-Locke executives were familiar with Tom Waits' adamant stance against doing commercials. On the day the commercial was recorded, Carter, the impersonator, told Brenner that Waits would not be happy about this commercial. Brenner agreed, "Oh, yeah . . . We approached him one time to do a Diet Coke and you never heard anybody say no so fast in your life." Reporters Transcript ("RT"), Vol. 2, 42:10-24. LaFlamme, too, was told by Carter that Waits would not be happy with a commercial in which he appeared to be endorsing a product. *Id.* at 43:16-44:3.

Brenner, admittedly familiar with the *Midler* decision[1] which establishes the California tort of misappropriation of a widely-known performer's distinctive voice for commercial purposes, told Grossman, who was also familar with *Midler,* that the agency and client were headed

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[1] *Midler v. Ford Motor Company,* 849 F.2d 460 (9th Cir. 1988), *cert. denied,* 112 S.Ct. 1513 (1992).

for a problem with Waits. Grossman spoke briefly, by telephone, with an in-house lawyer in New York, who acknowledged the *Midler* decision; advised that "style", as opposed to "voice", of itself was not protectable; and warned of a "high profile risk" of a lawsuit.

Grossman took the tape of the Carter version to Jeff Myers at Frito-Lay for approval. He also reviewed with Myers an alternative version of the commercial featuring another singer which steered clear of a Waits imitation. Myers wanted the Carter rendition; Grossman not only recommended it, but promised that Tracy-Locke would indemnify Frito-Lay in the event of a lawsuit. This made Myers' choice an easy one, and in a matter of days the commercial was broadcast in 61 major market across the country.

There was substantial testimony at trial that radio listeners who heard the commercial thought it was indeed performed by Waits. One Waits fan was "horrified" and felt "betrayed". RT, Vol. 5, 147:22-149:1. A popular music critic for *The Los Angeles Times,* who was driving his auto when he first heard the commercial, testified: "I just almost went off the road . . . I was astounded . . . [M]y image of Mr. Waits was that he would be just about the last person maybe after Bruce Springsteen to ever do a commercial." *Id.* at 33:8-25.

It is important to note what is not made clear in Petitioner's Statement of the Case:

The offending commercial is not a version of "Step Right Up" or any other Tom Waits recording. All the elements of it originate with Tracy-Locke – melody, lyrics, script. The *only* basis for Waits' complaint involved here is the imitation of his voice. For example, had the original Doritos commercial featuring the deep blues-sound-

ing voice of Jim Byrnes been used, Waits would have no complaint, and even as to the offending Carter version, the law of copyright is not involved, either by direct prohibition or by preemption.

For Petitioners here to suggest that Waits "presented no evidence that Petitioners attempted to imitate the sound of Waits' voice apart from the recorded version of 'Step Right Up' ", Petitioners' Memorandum at 28, is disingenuous in the extreme. The jury heard the commercial (Exhibit 44) and "Step Right Up" (Exhibit 45). That alone is evidence that the songs are different, but that the vocal on the commercial is a pure imitation of Waits' distinctive voice.

REASONS FOR DENYING THE PETITION

I.

THE "MIDLER TORT," MISAPPROPRIATED USE OF A PROFESSIONAL SINGER'S DISTINCTIVE VOICE IN A COMMERCIAL ADVERTISEMENT, IS NOT PREEMPTED BY THE COPYRIGHT ACT OF 1976.

The Ninth Circuit's holdings in *Midler* and in *Waits* were carefully and narrowly drawn. The *Waits* Court held:

> "The trial's focus was on the elements of voice misappropriation, as formulated in *Midler*: whether the defendants had deliberately imitated Waits' voice rather than simply his style and whether Waits' voice was sufficiently distinctive and widely known to give him a protectable right in its use. These elements are different in kind from those in a copyright infringement case challenging the unauthorized use of a song or recording." *Waits v. Frito-Lay, Inc.*, No. 90-55981, Petition for Writ of Certiorari (hereinafter "Petition"), Appendix, p. A-14.

Moreover, the *Waits* trial court effectively added an additional element to the *Midler* tort – actual confusion. The jury was required to find that people familiar with Waits actually believed it was Waits performing on the commercial. *Id.* at A-16 & n.3.

More than four years have passed and this is only the second reported case involving the *Midler* tort in California; and as Petitioners themselves point out, other states have not yet even adopted, and some have rejected, voice misappropriation as an element of the rights of privacy/publicity, Petition, p. 10, fn.3. Accordingly, the legal issue raised by this case is one which arises under California state law only, has not been a frequently recurring one, and certainly does not cry out for further consideration by this Court.

Philosophically, the Ninth Circuit considered and faithfully followed the teachings of this Court in reaching its conclusion that Waits' California-law voice misappropriation claim was not preempted by Federal law. Although this Court, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 S.Ct. 971 (1989), ultimately found a Florida statute to be preempted by Federal patent law, in reaching its decision it emphasized that the states may themselves take steps to prevent consumer confusion of source and to protect intellectual creation. (*Id.*, 489 U.S. at 165, 109 S.Ct. at 979-981, cited in Petition, Appendix pg. A-12-13; A-42-43). In the case at bar, "actual confusion" became an element of the voice misappropriation tort at trial. Thus, the tort of voice misappropriation fell squarely within the regulatory power of the states.

Moreover, this Court has specifically held that a state-protected right of publicity (a right closely akin to

voice misappropriation) is not preempted. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), a professional entertainer had not given his consent to the televising of his performance on a news broadcast. His state law remedy was upheld by this Court as not conflicting with the Constitution or the federal copyright law. The rationale that supported the right of publicity remedy in *Zacchini* applies with equal force here:

> " 'The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' " *Id.* at 576, 97 S.Ct. at 3857 (*quoting* Kalven, *Privacy in Tort Law – Were Warren & Brandeis Wrong?*, 31 Law & Contempt. Prob. 326, 331 (1966)).

The tort of voice misappropriation is similarly not preempted by federal copyright law. The Copyright Act, 17 U.S.C. 301, provides in pertinent part:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 in works that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title."

Consistent with this provision, Courts have held that states may protect intangible assets such as a celebrity's distinctive identity, *see, e.g., Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); or name, *Carson v. Here's Johnny Portable Toilet's Inc.*, 698 F.2d 831, 837 (6th Cir. 1983). A distinctive human

voice, likewise an intangible asset, is also entitled to protection against unauthorized use in a commercial setting. *Accord, Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962) (actor and comedian Bert Lahr stated cause of action for misappropriation and injury to reputation based on imitation of his unique style of vocal comic delivery in a television commercial).

Petitioners confuse what *was* complained of in this action with what was *not*. Waits did *not* claim infringement of any sound recordings or musical compositions. As Petitioners conceded in their brief submitted to the Court below: "Defendants' Salsa Rio commercial used original music which, of course, had never been performed by Waits." (Appellants' Opening Brief filed with the Ninth Circuit Court of Appeals, p. 27). Therefore, Petitioners' entire discussion of Section 114 of the Copyright Act, and its legislative history[2], misses the mark. This is simply not a case where the copyright owner of a second recording (that is, the sounds fixed in a particular recording) sues a defendant for attempting to copy that recording. As one leading commentator writes:

> "The first possible federal preemption issue was tangentially touched on in the *Sinatra* and *Booth*

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[2] The Ninth Circuit gave due consideration to the legislative history of the Copyright Act of 1976. The *Waits* court stated:

> "[T]he legislative history of Section 114 indicates the express intent of Congress that '[t]he evolving common law right of 'privacy,' 'publicity,' and trade secrets . . . remain unaffected [by the preemption provision] as long as the causes of action contain elements, such as an invasion of personal rights . . . that are different in kind from copyright infringement.' " *Waits v. Frito-Lay, Inc.*, Appendix at p. A-14 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 132, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748).

> cases.[3] There, the courts worried about the possibility that the commercial firm which obtains a copyright license to use copyrighted words and music in an advertisement might, in a overabundance of caution, feel compelled to also pay for a Right of Publicity license 'to each artist who has played or sung the composition and who might therefore claim' infringement. As noted above, *this possibility has no relevance to a case where an advertiser hires a mimic to imitate the vocal style of a specific performer. There, the advertiser knows exactly whose voice is being imitated and whose voice is intended to attract attention to the ad.*" J.T. McCarthy, *The Rights of Publicity and Privacy*, §4.14[E][2] (citations omitted) (emphasis added).

In the *Midler* case, plaintiff Bette Midler brought an action against Ford and its advertising agency for their deliberate use of a "sound-alike" in a television commercial which featured "Do You Want To Dance", a song Midler had made popular. The advertising agency acquired a license from the copyright owner of the underlying musical composition. On that basis, the advertising agency and its client (Young & Rubican and Ford Motor Company) argued to the Ninth Circuit, and to this Court, that an imitation of a specific sound recording – there, the original version of "Do You Want To Dance" – was not prohibited under the Copyright Act. 17 U.S.C. §114. Thus, they argued, the tort of voice misappropriation, in the context of those facts, was preempted. The Ninth Circuit and this Court's rejection of that argument applies *a fortiori* here. Frito-Lay and Tracy-Locke

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[3] *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970); *Booth v. Colgate-Palmolive Co.*, 362 F.Supp. 343 (S.D.N.Y. 1973).

did not imitate an existing Waits sound recording. This is a "pure" case of voice misappropriation and falls well outside the ambit of the copyright law.

Moreover, in the instant case, Waits proved actual confusion as to who performed on that commercial. His tort claim thus arose under state law designed to protect against consumer confusion, which, as *Bonito Boats* recognizes, is not preempted by federal law. California's interest in protecting one of its citizens from unauthorized commercial use of his distinctive and widely-known voice is equally entitled to great respect.

II.

THE OPINION BELOW IS NOT IN CONFLICT WITH THE SEVENTH CIRCUIT'S OPINION IN THE *BALTIMORE ORIOLES* CASE.

Petitioners argue that there is a conflict between the Ninth Circuit's position in this case and the holding of the Seventh Circuit in *Baltimore Orioles v. Major League Baseball Players,* 805 F.2d 663 (7th Cir. 1986), *cert. denied,* 480 U.S. 941 (1987). In the first place, the two cases have no factual similarities whatsoever. This case involves a claim brought by a widely-known singer against the manufacturer of a snack food and its advertising agency concerning the unauthorized imitation of the singer's distinctive voice in a radio commercial. There was no question that Waits had not consented to the use of his voice; indeed, Waits had no contractual relationship with either defendant.

Baltimore Orioles, on the other hand, presented the issue of the Major League Baseball Players Association's ownership, if any, as against the Major League Baseball Clubs, of television broadcast rights of the players' per-

formances during Major League baseball games. The Clubs claimed that the telecasts were within the scope of the players' employment agreements, and that, as "works made for hire" the taped telecasts were owned exclusively by the Clubs.

Moreover, there is no conflict in the principles of law relied upon in the two cases. The *Baltimore Orioles* case dealt with "works of authorship *fixed in a tangible medium of expression* . . . and within the subject matter of copyright", 17 U.S.C. §301, that is, the recorded telecasts. In the *Waits* case, the Plaintiff's voice and personality were not fixed.

Specifically, in *Baltimore Orioles,* the Seventh Circuit reasoned that the players' right of publicity in their recorded performances was preempted because the performances were "fixed" within the meaning of Section 101 of the Copyright Act. The players had given their consent to the televising of the games in their contracts and thus the "work" was recorded by the Clubs under the "author's" authority. *Id.* at 670-673. The *Baltimore Oriole* Court was careful to limit its decision to the facts before it:

> "It is, of course, true that unrecorded performances per se are not fixed in tangible form. Thus, if a baseball game were not broadcast or were telecast without being recorded, the players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption." *Id.* at 674.

Here, the Court below emphasized that Waits' claim, like Bette Midler's, "is for infringement of voice, not for infringement of a copyrightable subject such as sound recording or musical composition." (*Waits v. Frito-Lay, Inc.*, Petition, Appendix p. A-14.) The Court, quoting

with approval from *Midler*, held that a "voice" is not copyrightable because "[t]he sounds are not fixed." *Id.*, Appendix p. A-13; *Midler, supra*, 849 F.2d at 462.

Indeed, even the *Baltimore Orioles* court recognizes that a right akin to that asserted by Waits is not "fixed" and is not subject to preemption. In discussing and following this Court's decision in *Zacchini*, the Seventh Circuit stated:

> "To be 'fixed' in a tangible form, a work must be recorded 'by or under the authority of the author,' here Zacchini. Because Zacchini did not consent to the telecast, the broadcast could not be 'fixed' for the purpose of copyrightability and Zacchini's right of publicity would not be subject to preemption." 805 F.2d at 675-76 & n.22 (citations omitted).

Similarly, in this case, Tom Waits did not consent to the use of his voice, or an imitation of his voice, in a snack food commercial. To the contrary, the evidence decisively showed that Petitioners knew Waits *would not consent* to any such use, and went forward with the commercial all the same. Petitioners' reliance on *Baltimore Orioles* thus fails because (1) the subject matter – a voice – is not "fixed", and (2) the "work" used was not under the authority of Respondent.[4]

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[4] *Brown v. Twentieth Century Fox Film Corp.*, 799 F.Supp. 166 (D.D.C. 1992), cited by Petitioners in a letter dated December 1, 1992, to the Clerk of this Court, is in no way inconsistent with the Ninth Circuit's opinion, below. In *Brown*, the District Court granted summary judgment to defendants on the ground that plaintiff, an entertainer, had previously granted to defendants' assignor all necessary rights in his filmed (*i.e.*, fixed) performance. Since defendants lawfully acquired the rights, there was no copyright infringement, violation of the right of publicity or other wrongful act upon which relief could be granted. Also, there was no allegation that plaintiff's name had been used to promote a product.

[footnote continued]

CONCLUSION

For the foregoing reasons, Respondent Tom Waits respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 17, 1992

The contrast with the instant case, in which Waits' voice, an intangible, was utilized without permission to endorse a product, is obvious.

CERTIFICATE OF SERVICE

I hereby certify that today, December 17, 1992, I caused to be mailed 3 copies of this Respondent's Brief In Opposition To Petition For Writ of Certiorari, first class postage prepaid, to:

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